Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

DOUGLAS LEE HUTTON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

On Petition For Writ Of Certiorari
To The Colorado Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances do actions taken by or on behalf of defense counsel to convince a criminal defendant to accept a plea bargain operate as coercion so as to render a defendant's guilty plea constitutionally involuntary?

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PETITION FOR WRIT OF CERTIORARI

Douglas Lee Hutton respectfully petitions for a writ of certiorari to review the judgment in this case of the Colorado Court of Appeals.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals, (Appendix A, *infra*), was not selected for official publication. The District Court of Jefferson County issued oral findings which are reproduced at Appendix B, *infra*. The order of the Colorado Supreme Court denying discretionary review is reproduced at Appendix C, *infra*.

JURISDICTION

The Colorado Court of Appeals entered its judment on March 23, 1995. (Appendix A, *infra*, at A-1). The Colorado Supreme Court entered its order denying discretionary review on December 11, 1995. (Appendix C, *infra*, at C-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL AND PROCEDURAL PROVISIONS

Amendment V to the Constitution of the United States provides, in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be

> deprived of life, liberty, or property, without due process of law. . . .

Amendment VI to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

Amendment XIV to the Constitution of the United States provides, in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Colorado Rules of Criminal Procedure 11(b), 5(a)(2), and 32(d) are reproduced at Appendix D, *infra*.

STATEMENT OF THE CASE

In February, 1991, Petitioner was charged with two felony counts of sexual assault on a child, to which he entered pleas of not guilty. During the period preceding trial, Petitioner rejected all efforts by his counsel and the People to negotiate a plea agreement. To be sure, Petitioner has consistently maintained his innocence throughout these proceedings. On the morning of December 8, 1992, Petitioner arrived at court for the commencement of his trial when he was informed by his counsel that the

People were offering a plea disposition wherein Petitioner would plead guilty to one count of sexual assault in exchange for the People's dismissal of the second count and a recommendation of probation. (Appendix A, *infra*, at A-2 and A-3).

Petitioner later testified that his counsel, after recommending acceptance of the People's offer, had Petitioner telephone his court-appointed psychiatrist, who told Petitioner that she worked in jails and knew that prisoners accused of sexually assaulting children had a very rough time of it in prison, and that it was very likely that Petitioner would be raped or killed in prison. Immediately thereafter, and although a subject of some dispute (see Appendix A, *infra*, at A-5 and A-6), defense counsel made additional attempts to convince Petitioner to accept the People's offer, including a statement that Petitioner would "make a good wife for someone in prison."[1] [Volume II, 7/30/93, P.99]. It is Petitioner's contention that, despite his continued protestations of innocence, these statements caused fear to overwhelm him and relent to counsel's pressure to accept the offered plea agreement. [Volume II, 7/30/93, Pp.104, 117].

Immediately thereafter, a written petition to enter a plea of guilty, signed by Petitioner and his counsel, was

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[1] Selected citations to the record before the Colorado Court of Appeals are indicated with brackets, should the Court desire to review portions of that record in connection with its consideration of this Petition. These citations reference the volume, hearing date, and page number(s) of said appellate record.

submitted to the trial court, which also conducted a providency hearing, pursuant to Colo. R. Crim P. 11(b) and 5(a)(2), before accepting the plea.[2] (Appendix A, *infra*, at A-4 and A-5). Petitioner's counsel later testified that Petitioner had a "separation from reality" in evaluating and discussing the particulars of the written petition and advisement. [Volume II, 7/30/93, P.89].[3] Petitioner indicated that, during the Rule 11 proceedings, he responded to the court's questions the way counsel wanted him to respond. [Volume II, 7/30/93, Pp.105, 109].

Prior to sentencing, Petitioner informed his counsel that he felt he had been coerced into pleading guilty and requested counsel file a motion to withdraw the plea, with which request counsel complied. (Appendix E, *infra*).[4] Pursuant to Colo. R. Crim. P. 32(d), the motion was filed prior to sentencing. (Appendix D, *infra*, at D-3). In this motion, and in a supporting memorandum of law filed prior to sentencing, Petitioner asserted the constitutional invalidity of his guilty plea based on the coercive

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[2] Petitioner does not contend that the trial court's advisement, pursuant to Colorado Rule of Criminal Procedure 11(b), was procedurally defective. It is notable, however, that Petitioner did not specifically admit his guilt to the alleged criminal act during the providency hearing. [Volume II, 12/8/92, Pp.6-11].

[3] It is notable that, earlier in these proceedings, counsel was concerned enough about Petitioner's competency to request and obtain a competency review of Petitioner. (Appendix B, *infra*, at B-3).

[4] In addition to filing the Rule 32(d) motion, counsel successfully sought to withdraw from the case. Petitioner thereafter retained other counsel to argue the motion to withdraw his guilty plea. (Appendix F, *infra*, at F-1).

circumstances outlined hereinabove. (Appendices E and F, *infra*).

Thereafter, the trial court conducted an evidentiary hearing on Petitioner's motion to withdraw his plea, following which the court made oral findings of fact (Appendix B, *infra*). Under Colorado law, after entry of a guilty plea and prior to sentencing, a trial court should allow a defendant to withdraw his plea for any fair and just reason. *People v. Lewis*, 849 P.2d 854 (Colo.App. 1992).[5] Here, the court found that Petitioner had failed to establish a fair and just reason for the plea to be withdrawn. (Appendix B, *infra*, at B-7). Additionally, on the constitutional claim of coercion, the trial court essentially determined that the plea was entered voluntarily. (Appendix B, *infra*, at B-6). Thereafter, having denied the motion to withdraw the guilty plea, the trial court sentenced Petitioner to six years of intensively supervised probation and sex offender counseling. (Appendix A, *infra*, at A-2).

On appeal, Petitioner alleged error both in the trial court's finding that no fair and just reason had been established to withdraw the plea and in the court's finding that the plea had been entered voluntarily. The Colorado Court of Appeals, citing *People v. Weed*, 830 P.2d 1095 (Colo.App. 1991), found no abuse of discretion in the trial court's denial of the motion to withdraw the plea. (Appendix A, *infra*, at A-3). Additionally, the Court of Appeals held the guilty plea was not constitutionally

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[5] It should be noted that the "fair and just reason" standard for pre-sentence plea withdrawals is identical to Fed. R. Crim. P. 32(e).

infirm. (Appendix A, *infra*, at A-6). With regard to the alleged coercion by counsel, the court noted that competent advice of counsel does not constitute coercion and "even if we were to conclude that this comment was made and that it exceeded the bounds of counsel's proper role, we would, nevertheless, conclude that the trial court did not err in finding that defendant's plea was knowingly and voluntarily entered." (Appendix A, *infra*, at A-5 and A-6).

Petitioner respectfully submits that such a holding impermissibly restricts a proper consideration of those factors which this Court has developed in evaluating the constitutional validity of guilty pleas. It also highlights the need for additional guidance by this Court in the area of coerced pleas.

REASONS FOR GRANTING CERTIORARI

It has been estimated that upwards of 90 percent of all criminal convictions, and between 70 and 85 percent of all felony convictions, are the result of guilty pleas. *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Federal and state courts have long dealt with issues involving constitutional attacks on such pleas and the circumstances under which such pleas may be withdrawn. *See Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927) (Court, upon timely application, should vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear, or inadvertance). Given the vast number of criminal cases resolved by guilty pleas, the parameters governing the

constitutional voluntariness of such pleas is of obvious importance.

THE DISPOSITION OF THIS CASE BY THE COLORADO COURT OF APPEALS DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In the case at bar, Petitioner alleges that his guilty plea was involuntary, and therefore constitutionally invalid, because the plea was coerced by statements and actions of his counsel which overbore his will. In upholding the validity of the guilty plea, the Colorado Court of Appeals essentially found that defense counsel's actions, even if improper, could not have influenced the voluntary character of that plea. (Appendix A, *infra*, at A-5 and A-6). This finding is clearly contrary to prior rulings by this Court.

In *Marchibroda v. United States*, 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed.2d 473 (1962), this Court found that a guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. The foundation upon which this principle rests is those due process rights guaranteed by the Fifth Amendment to the United States Constitution and made applicable to the states by reason of the Fourteenth Amendment. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

In *Boykin, supra*, this Court held the standards which govern a determination of the voluntary character of a guilty plea are identical to those involved in the waiver of fundamental constitutional rights:

> We think the same standard must be applied to determining whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, **coercion, terror,** inducements, **subtle or blatant threats might be a perfect cover-up of unconstitutionality.** The question of an effective waiver of a federal constitutional right in a proceeding is of course governed by federal standards.

Boykin, supra, 395 U.S. at 242-243, 89 S.Ct. at 1712, 23 L.Ed.2d 274 (emphasis added). In this vein, lower federal courts have held that a plea may be rendered involuntary by mental as well as physical coercion. *See, e.g., United States v. Cammisano,* 599 F.2d 851 (8th Cir. 1979); *Pickens v. United States,* 427 F.2d 349 (5th Cir. 1970).

Where, as here, the alleged coercion stems from the actions of defense counsel, the fundamental right to effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution is also implicated. *See Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Thus, a guilty plea is void if shown to be actuated by misleading statements of counsel. *Heidman v. United States,* 281 F.2d 805 (8th Cir. 1960). Additionally, a guilty plea resulting from false advice from counsel as to the sentence to be imposed may be set aside as having been unlawfully coerced. *United States v. Simpson,* 436 F.2d 162 (D.C. Cir. 1970).

In this case, the courts below relied primarily on the representations made during the providency hearing conducted by the trial court as a basis for finding the plea voluntary. Certainly, Petitioner would concede that those

proceedings are a "formidable barrier" to a subsequent collateral attack on the plea. *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629, 52 L.Ed.2d 136 (1977). However, as *Blackledge* noted, and other courts have found, a defendant's statement at the time of pleading guilty that the plea is voluntary and intelligent is not dispositive. *See Downs-Morgan v. United States*, 765 F.2d 1531, 1541 n.14 (11th Cir. 1985).

This is especially true in a case where, as here, coercion by defense counsel immediately prior to entry of the plea is alleged. It was precisely the coercive action of counsel which caused Petitioner to answer the court's questions the way counsel wanted him to respond. Thus, a reviewing court's inquiry should involve considerations in addition to the fact that the providency hearing was conducted in a procedurally correct manner.

Indeed, this Court's opinions mandate a consideration of the totality of circumstances to determine whether the plea is voluntary. *Brady v. United States, supra*, 397 U.S. 742, 749, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Here, the judgment of the Colorado Court of Appeals specifically forcloses a consideration of counsel's alleged coercion as a factor in that determination. Such a ruling should not be allowed to stand.

What the totality of circumstances does disclose is that Petitioner has steadfastly maintained his innocence throughout the proceedings below. Moreover, Petitioner had no prior criminal record and no substantial contacts with the criminal justice system. [Volume I, P.193]. As such, his heightened reliance upon his counsel made him particularly susceptible to coercive tactics. Moreover,

defense counsel had previously expressed concern over Petitioner's competence.

Nevertheless, in an emotionally charged setting on the very morning of trial, counsel set out to persuade his client that he should enter a guilty plea despite Petitioner's continued protestations of innocence. What followed were statements by both counsel and Petitioner's psychiatrist (in a telephone call made at counsel's behest) which convinced Petitioner that he was likely to be raped and killed in prison unless he accepted the proposed plea agreement.

Counsel admitted that Petitioner thereafter suffered a separation from reality in evaluating the factors involved in entering his plea. This evaluation included a discussion of the waiver of those fundamental rights guaranteed by the Fifth, Sixth and Fourteenth Amendments. It is precisely the voluntary and intelligent waiver of such rights which the plea colloquy is designed to ensure. *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1975).

Because, as his own counsel admitted, Petitioner had separated from reality at the time he entered his plea, it is difficult to comprehend how such a plea could be voluntary in a constitutional sense. The sources of that separation from reality were the words and actions of Petitioner's counsel immediately prior to the providency hearing. Petitioner respectfully submits that such tactics are precisely the kind of coercion, terror and threats which this Court has established as grounds to invalidate a guilty plea. *Boykin, supra; Marchibroda, supra.*

CONCLUSION

Because the Colorado Court of Appeals has decided the instant matter in a way which would delete a fundamental consideration from the evaluation of the voluntary nature of guilty pleas, in derogation of the constitutional mandates of this Court, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

COLORADO COURT OF APPEALS March 23, 1995
No. 93CA1730 NOT SELECTED FOR PUBLICATION

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Douglas Lee Hutton,

Defendant-Appellant.

Appeal from the District Court of Jefferson County
Honorable William P. DeMoulin, Judge
No. 91CR747

Division III JUDGMENT AFFIRMED
Opinion by JUDGE HUME
Taubman and Pierce,* JJ., concur

Gale A. Norton, Attorney General, Stephen K. ErkenBrack, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Amy W. Naes, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

McMichael, Burlingame, Multz & Lipton, Donna A. Salmon, Denver, Colorado, for Defendant-Appellant

Defendant, Douglas Lee Hutton, appeals the judgment of conviction entered after he pled guilty to one count of sexual assault on a child. We affirm.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S. (1994 Cum. Supp.).

In February 1991, defendant was charged with two counts of sexual assault on a child. On the morning of trial, December 8, 1992, he entered a plea of guilty to one count of sexual assault in exchange for the People's dismissal of the second count and a recommendation for probation. However, on February 16, 1993, prior to sentencing, defendant filed a Crim. P. 32(d) motion to withdraw his guilty plea.

After an evidentiary hearing, the trial court denied defendant's motion. Thereafter, the court sentenced him to six years of intensively supervised probation and sex offender counseling.

I.

Defendant first contends that the trial court erred in denying his Crim. P. 32(d) motion on the ground that he failed to establish a fair and just reason to withdraw his guilty plea. We perceive no error.

A motion to withdraw a guilty plea prior to sentencing is addressed to the sound discretion of the trial court, and its denial will not be reversed absent a clear abuse of discretion. *People v. Miller,* 685 P.2d 233 (Colo. App. 1984). To constitute an abuse of discretion, the court's ruling must be "manifestly arbitrary, unreasonable, or unfair." *People v. Lewis,* 849 P.2d 854 (Colo. App. 1992).

After the entry of a guilty plea and prior to sentencing, the trial court should allow a defendant to withdraw the plea for any fair and just reason. 3 ABA, *Standards for Criminal Justice,* Standard 14-2.1(a) (2d ed. 1986 Supp.). The burden of demonstrating a "fair and just reason" for

withdrawal of the plea rests with the defendant. *People v. Lewis, supra.* Once the defendant meets this burden, the burden shifts to the prosecution to establish that it would suffer substantial prejudice if the defendant's plea were to be withdrawn. 3 ABA, *Standards for Criminal Justice,* (Comments) Standard 14-2.1(a) (2d ed. 1986 Supp.) (Comments).

Defendant asserts that, because he consistently maintained his innocence, had a relatively rapid change of heart regarding the wisdom of his plea, has a "better than average" chance of being found not guilty at trial, and claims that he was pressured into pleading guilty, fair and just reasons exist to withdraw his plea.

Here, the trial court held an evidentiary hearing before denying defendant's motion. The judge who presided at this hearing had also conducted defendant's Crim. P. 11(b) advisement during the entry of the plea. The court considered the record concerning the Crim. P. 11(b) hearing and the prosecution's arguments concerning the effects of delaying the trial including statements of evidence and adverse effects on the child witness. The court also heard and considered a forensic psychiatrist's testimony that denial of commission of the offense is not unusual for this type of crime before finding that defendant had failed to establish a fair and just reason for his plea to be withdrawn.

Based on the record before us, we cannot say that the trial court's finding was manifestly arbitrary, unreasonable, or unfair. *See People v. Weed,* 830 P.2d 1095 (Colo. App. 1991).

II.

Defendant next contends that the guilty plea was constitutionally infirm because it was not entered knowingly or voluntarily. We are not persuaded.

To meet due process requirements, the entry of a guilty plea must be knowing and voluntary. This means that the defendant must understand the critical elements of the crime charged and the consequences of a guilty plea. *People v. Wade*, 708 P.2d 1366 (Colo. 1985).

A trial court may assure itself that a plea of guilty is being entered in accordance with the constitutional requirements by complying with Crim. P. 11(b), by insisting that a written plea agreement signed by the defendant and his attorney is filed with the court, or by interrogating the attorney about the nature of the advisement given to the defendant. *People v. Lesh*, 668 P.2d 1362 (Colo. 1983).

A reviewing court looks to the record as a whole to determine whether a defendant's plea was knowing and voluntary. *People v. Moore*, 636 P.2d 1290 (Colo. App. 1981). This analysis includes not only statements made during a Crim. P. 11(b) hearing, but also statements made by the defendant and his attorney in a written petition to plead guilty. *People v. Lesh, supra.*

Here, defendant submitted a written petition to enter a plea of guilty. The petition, signed by defendant and his attorney, contains an explanation of the elements of sexual assault on a child and includes the defendant's assertions that he understood those elements, that his attorney

had explained to defendant's satisfaction the consequences of a guilty plea, that there was a factual basis for the plea of guilty to the crim charged, and that the plea was voluntary.

In addition, the trial court conducted a thorough Crim. P. 11(b) providency hearing during which it specifically questioned defendant about his understanding of each portion of the petition. Again, defendant asserted that his attorney encouraged him to study the petition before signing it, that he understood its contents, and that the plea was not the result of any threats, coercion, or pressure.

However, defendant alleges that, even though the court fully complied with Crim. P. 11(b), his plea was not, in fact, voluntary, but the result of coercion exerted by his attorney, his psychiatrist, and his mother.

Defendant specifically points to discussions concerning the possibility that he would be sexually assaulted or killed in prison and asserts that he was "overwhelmed" with fear and thus unable to make a rational decision to enter the guilty plea.

However, competent advise of counsel does not constitute coercion. It is defense counsel's duty to discuss his or her client's case with complete candor and to offer his or her best estimate of the probable outcome and consequences. *People v. Adams*, 836 P.2d 1045 (Colo. App. 1991).

Although defendant here claimed that his attorney made a statement outside the limits of fair persuasion, the attorney did not remember making such a remark. However, even if we were to conclude that this comment

was made and that it exceeded the bounds of counsel's proper role, we would, nevertheless, conclude that the trial court did not err in finding that defendant's plea was knowingly and voluntarily entered.

The record overwhelmingly demonstrates that the trial court thoroughly questioned and evaluated defendant during the providency hearing in order to assure itself that the plea represented a free and voluntary act on the part of defendant. *See Lamb v. People*, 174 Colo. 441, 484 P.2d 798 (1971). That analysis took into account defendant's body language and demeanor as well as his statements to the court.

Because defendant stated at that time that no one had influenced or coerced him into pleading guilty, the trial court obviously disbelieved his subsequent testimony during the hearing on the motion to withdraw his plea and gave greater weight to the assertions made contemporaneously with the tender of his plea. *See People v. Marsh*, 183 Colo. 258, 516 P.2d 431 (1973).

Because the record supports the trial court's findings, it did not err in concluding that defendant's guilty plea was knowingly and voluntarily entered.

Judgment affirmed.

JUDGE TAUBMAN and JUDGE PIERCE concur.

APPENDIX B

DISTRICT COURT, JEFFERSON COUNTY, COLORADO

Case No. 91CR747, Division 3 (93CA1730)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

DOUGLAS LEE HUTTON,

Defendant.

The hearing in this matter was held on July 21, July 30 and September 17, 1993, before the HONORABLE WILLIAM P. DeMOULIN, Judge of the District Court.

APPEARANCES

FOR THE PEOPLE:
STEVEN JENSEN, #14141
Deputy District Attorney

FOR THE DEFENDANT:
LEONARD CHESLER, #3631
JOHN TATUM, #11787
Attorneys at Law

[p. 128] FRIDAY, SEPTEMBER 17, 1993

PROCEEDINGS

(The following proceedings were had with all parties present.)

THE COURT: Good morning. We'll reconvene 91CR747, People versus Hutton, on the motion to withdraw the guilty plea.

[p. 158] THE COURT: Thank you.

I will accept, as I understand, Mr. Jensen has accepted the basic premise in the defendant's memorandum of law that the defendant has the burden of establishing a fair and just reason for the withdrawal of his guilty plea.

I would first of all recognize that the first appearance of the defendant in this Court on this matter was November 18, 1991. The matter was set for trial for December 8, 1992. In going over my notes of the hearings held on July 21 and July 30, I would simply note some of the following:

Dr. Morall was stipulated to be an expert in forensic psychiatry and testified that she, in her examination, had found nothing helpful of a psychiatric nature to assist the defendant at trial in terms of his [p. 159] competency. She testified that, after reviewing the facts and the defendant's fear of incarceration, her recommendation was that the defendant accept the guilty plea. She testified, and this Court will recognize, that under certain circumstances, in a providency hearing, the defendant will tend to say what he feels that the Judge wants to hear.

Because of that – and I say this as an aside – in the years that I've been a Judge, I've tried to analyze the

appellate decisions concerning the adequacy of a providency hearing, and I've tried to tailor my questions to any defendant in terms of my satisfaction that the defendant understands what's happening, understands the consequences, and is doing it voluntarily. I take great concern in that. I don't rush any providency hearing, and I didn't rush this one. And I take great pangs [sic] to determine whether the defendant is voluntarily doing this.

I note also that Dr. Morall testified that a denial of the offense is not unusual by the defendant with this type of offense. I'm saying this because she would be required to say this at trial. And I think that has to be factored into it also. She also testified that, in her opinion, the defendant's denial got in the way of other rational decisions.

Mr. Sweet testified that several offers had been made at several stages, and the defendant's position had been [p. 160] that he didn't want any type of disposition, but that he never asked Mr. Sweet to take the initiative. That factors into my determination of who was pulling the strings, so to speak. Mr. Sweet testified – and I feel that I have to agree with him – that the defendant would not make a good witness from a demeanor standpoint. And that factored into his decisions concerning trial.

Mr. Sweet was very concerned and he testified to a lot of factors that he saw, including the defendant's phobia of telephones, his refusal to follow recommendations with regard to employment, compulsive list-writer, unrealistic approaches toward the facts, and that led Mr. Sweet, of course, to seek the competency review.

He testified that, on the morning of trial, the district attorney's offer was similar to those which were rejected

in the past except that the difference was that the offer was no jail time. Now, I recognize that the Court is not bound by those offers. I also recognize that that is a huge factor to be considered.

And, if I were inclined to be cynical, and I'm trying not to be, if I were inclined to be cynical, my analysis of that is that the defendant, if he were allowed to withdraw his plea of guilty, is not taking much risk. If he goes to trial and he's acquitted, he's acquitted. If he goes to trial and he's convicted, he's looking at a Judge who [p. 161] probably would give him no jail time in the interests of rehabilitation. That's a low-risk situation.

And, as I say, if I were inclined to be cynical, I would analyze it in that approach. I don't analyze it in that approach; although, that is in the back of my mind, the fact that the defendant is looking at a low-risk situation if that were to occur. Obviously, jail time would occur if the defendant were granted probation and for some reason probation was violated.

Mr. Sweet also testified that closure was finally presented to the defendant on the morning of trial because of the no jail time. I think that's an important thing to keep in mind, too. He also testified that the defendant's parents were concerned about incarceration, and that the mother was in favor of the plea. And, Mr. Sweet finally testified that, shortly after the – shortly before the sentencing, the defendant came to Mr. Sweet's office and told him that, after a lot of soul searching, the defendant could not go through with the plea of guilty.

In trying to determine whether there's a fair and just reason for the withdrawal of the plea, I think I have to

look at several factors. One, obviously, is the environment in which the plea of guilty was entered, the reasons for the entry of a plea of guilty. In that respect, I note that Mr. Sweet, confirmed by the defendant, said, "Don't just sign [p. 162] this piece of paper, read it." And, my satisfaction from inquiring of the defendant during the providency hearing was that the defendant had read it and understood it.

Another factor I must consider in determining whether there's a fair and just reason for the withdrawal of the plea is the impact on both sides. The allege victim was age 12 at the time of the offense. And, if my mathematics is correct, he's – as of next Sunday, he will be 15 years of age. He will be subject to cross-examination based upon a memory that's now three years old, and that constitutes 20 percent of his lifetime.

If the defendant is guilty, I must consider the reasonable inferences on the impact of this victim in being brought back here three years later, and, possibly, at the time of trial, three and a half years later, to testify. It's a cliche that's used many times, but it still has a truthful basis to it that the Court in this type of situation is confronted with: At what point did the defendant lie to me? Did the defendant lie to me at the providency hearing? Was he lying to me now?

It's an extremely difficult situation for the Court to be put in. And, the Court, in determining whether there's a fair and just reason must not only consider that, but must consider also the other factors which I've discussed the impact on the victim, the delay in trial, the staleness of

[p. 163] the evidence, and, particularly, the environment of the providency hearing.

I did not see any strings being pulled. I was very careful in asking questions which were designed to elicit frank and honest responses from the defendant every step of the way, and I received those responses. There was no hesitation. There was no body language or demeanor which would indicate to me that there was a change of mind or a change of heart or a belief in innocence. And, believe me, when I see that happen, I stop the proceedings and I ask more questions until I'm satisfied that the defendant is comfortable with the plea of guilty.

Although the defendant has indicated that he has other thoughts in mind with regard to the Supreme Court decisions, I think, in analyzing my conduct – and I realize my conduct isn't at issue in this – but in analyzing my conduct, I've tried to give the defendant the benefit of the doubt in every one of my decisions, even to the extent of requiring the Supreme Court to tell me that I was wrong. Whether that's good or bad is not a factor, but it is a factor in my determination of whether there's a fair and just reason at this time to allow the withdrawal of a plea of guilty.

I'm frankly impressed with Dr. Morall's statement that denial of the offense is not unusual for this type of [p. 164] crime. And the defendant, in this context, is denying the offense. And I recognize Mr. Chesler's comment which he made in advocacy, but what I think is pertinent is that, impact of the victim aside, I may not be doing the defendant any big favor by allowing him to withdraw has plea, but go through the trauma of trial,

have a jury tell him that he's guilty. I'm not saying that would happen but, certainly, from my review of what everyone says the facts are, there's a substantial risk that would happen.

In my opinion, the more fair and just approach is to accept the plea of guilty over the defendant's protestations and get on with what I feel is the primary goal from this point forward, his rehabilitation. Therefore, I'm concluding from reviewing the entirety of the evidence that the defendant has failed in his burden of establishing a fair and just reason for his withdrawal of the plea; and, therefore, the motion for withdrawal of the plea of guilty is denied.

* * *

APPENDIX C

SUPREME COURT, STATE OF COLORADO
CASE NO. 95SC359
CERTIORARI TO THE COLORADO
COURT OF APPEALS, 93CA1730
DISTRICT COURT, JEFFERSON COUNTY, 91CR747

ORDER OF COURT

DOUGLAS LEE HUTTON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 11, 1995.

cc:

Donna A. Salmon
MCMICHAEL, BURLINGAME, MULTZ
& LIPTON
1580 Lincoln Street, #900
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Amy W. Naes
Assistant Attorney General
Criminal Enforcement Section

Honorable William P. DeMoulin
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Court Section, Suite 3030
100 Jefferson County Parkway
Golden, CO 80401-6002

Clerk of the District Court
Arapahoe County District Court
Arapahoe County Justice Center
7325 South Potomac Street
Englewood, CO 80112

Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX D

RULE 11. PLEAS

(b) Pleas of Guilty and Nolo Contendere. The court shall not accept a plea of guilty or a plea of nolo contendere without first determining that the defendant has been advised of all the rights set forth in Rule 5(a)(2) and also determining:

(1) That the defendant understands the nature of the charge and the elements of the offense to which he is pleading and the effect of his plea;

(2) That the plea is voluntary on defendant's part and is not the result of undue influence or coercion on the part of anyone;

(3) That he understands the right to trial by jury and that he waives his right to trial by jury on all issues;

(4) That he understands the possible penalty or penalties;

(5) That the defendant understands that the court will not be bound by any representations made to the defendant by anyone concerning the penalty to be imposed or the granting or the denial of probation, unless such representations are included in a formal plea agreement approved by the court and supported by the findings of the presentence report, if any;

(6) That there is a factual basis for the plea. If the plea is entered as a result of a plea agreement, the court shall explain to the defendant, and satisfy itself that the defendant understands, the basis for the plea agreement,

and the defendant may then waive the establishment of a factual basis for the particular charge to which he pleads;

(7) That in class 1 felonies, or where the plea of guilty is to a lesser included offense, written consent shall have been filed with the court by the district attorney.

RULE 5. PRELIMINARY PROCEEDINGS

(a) Felony Proceedings.

(2) *Appearance Before the Court.* At the first appearance of the defendant in court, it is the duty of the court to inform the defendant and make certain that the defendant understands the following:

(I) The defendant need make no statement and any statement made can and may be used against the defendant;

(II) The right to counsel;

(III) If indigent, the defendant has the right to request the appointment of counsel or consult with the public defender before any further proceedings are held;

(IV) Any plea the defendant makes must be voluntary and not the result of undue influence or coercion;

(V) The right to bail, if the offense is bailable, and the amount of bail that has been set by the court;

(VI) The nature of the charges;

(VII) The right to a jury trial;

(VIII) The right to demand and receive a preliminary hearing within a reasonable time to determine whether probable cause exists to believe that the offense charged was committed by the defendant.

RULE 32. SENTENCE AND JUDGMENT

(d) Withdrawal of Plea of Guilty or Nolo Contendere. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended.

If the court decides that the final disposition should not include the charge or sentence concessions contemplated by a plea agreement, as provided in Rule 11(f) of these Rules, he shall so advise the defendant and the district attorney and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere.

APPENDIX E

DISTRICT COURT, JEFFERSON COUNTY,
STATE OF COLORADO

Case No. 91 CR 0747, Division WPD

MOTION TO WITHDRAW GUILTY PLEA

(Filed Feb. 16, 1993)

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

DOUGLAS LEE HUTTON,

Defendant.

COMES NOW the Defendant, by and through his attorney, M. Evan Sweet, and respectfully submits his Motion to Withdraw Guilty Plea, and as grounds therefor, states as follows:

1. On December 8, 1992, the Defendant entered a plea of guilty to the charge of Sexual Assault on a Child.

2. Sentencing of the Defendant was to take place on February 5, 1993, however at the request of counsel, same has been continued to April 29, 1993 at 8:00 a.m. allowing time for the Defendant to be psychologically evaluated.

3. Defendant now believes that he entered his plea of guilty under coercive circumstances and did not knowingly, intelligently and freely tender said plea.

4. Defendant believes that his attorney of record and treating psychiatrist pressured him into accepting a

plea bargain on the day of trial and that he did not act freely in tendering a guilty plea.

5. Defendant believes that if given the opportunity to proceed to trial in this matter, that a jury will find him innocent of the charges against him.

WHEREFORE, Defendant, by and through is attorney, M. Evan Sweet, prays this Court grant this Motion to Withdraw Guilty Plea, and for such other and further relief as the Court deems proper in the premises.

Respectfully submitted,

/s/ M. Evan Sweet
M. Evan Sweet #12949
Attorney for Defendant
3190 So. Wadsworth Blvd. #220
Lakewood, Colorado 80227
(303) 989-2258

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of Motion to Withdraw Guilty Plea was placed in the U. S. Mail, postage pre-paid, this 10th day of February, 1993, addressed to the following:

Steven L. Jensen, Esq.
Deputy District Attorney
1726 Cole Blvd., #300
Golden, Colorado 80401

Douglas Hutton
3225 South Garrison, #28
Lakewood, Colorado 80227

/s/ Illegible

APPENDIX F

DISTRICT COURT, JEFFERSON COUNTY,
STATE OF COLORADO

Case No. 91-CR-0747, Division WPD

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA

(Filed Sep. 17, 1993)

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

v.

DOUGLAS LEE HUTTON,

Defendant.

Defendant Douglas Hutton by counsel, The Law Firm of Leonard M. Chesler, respectfully submits this Memorandum in Support of a Motion to withdraw guilty plea to this Honorable Court.

The law governing the withdrawal of guilty pleas in Colorado is clear. Pursuant to Colorado Rule of Criminal Procedure 32(d) a defendant may file a motion to withdraw a plea of guilty before sentence is imposed. To warrant the withdrawal before the imposition of sentence, the defendant has the burden of establishing a "fair and just reason" for the withdrawal. *People v. Luna*, 17 Brief Times Report 382, 383 (Colo. App. 1993); *People v. Chippewa*, 751 P.2d 607, 609 (Colo. 1988). *See* III ADNA, Standards of Criminal Justice, 14-2.1(a) (2d ed. 1980) ("before sentence, the court should allow the defendant

to withdraw the plea for any fair and just reason unless the prosecution has been substantially prejudice by reliance upon defendant's plea"). Finally, a motion to withdraw a guilty plea is addressed to the sound discretion of the court. *Luna*, 17 Brief Times Reporter 382, 383.

In the case at bar, the defendant's motion to withdraw guilty plea was filed on February 10, 1993, before imposition of sentence. Defendant wishes to withdraw his guilty plea because he now believes that he entered his plea of guilty under coercive circumstances and did not knowingly, intelligently and freely tender such plea. Defendant asserts that his prior attorney of record, M. Evan Sweet, and the treating psychiatrist pressured him into accepting a plea bargain on the day of trial and that he did not act freely in tendering the guilty plea. Defendant is not guilty and asserts his innocence of the crime charged. The only reason he pled guilty to the crime was because he was afraid of what might happen to him in jail if convicted of sexual abuse of a minor. Defendant has subsequently changed his mind as to his guilty plea, has obtained new counsel, and wishes to go to trial on the charges.

Both new and old counsel as well as defendant believe that if given the opportunity to try the case to a jury there is a good chance that the defendant will be acquitted of the charge.

The above mentioned reasons for withdrawing of the guilty plea are fair and just and the prosecution is not substantially prejudiced by relying on defendant's plea.

The ends of justice will be met if the court in its discretion allows defendant to withdraw his plea of guilty.

Respectfully submitted,

THE LAW FIRM OF
LEONARD M. CHESLER

/s/ Leonard M. Chesler,
Leonard M. Chesler,
Reg no. 3631
John S. Tatum, Reg no. 11787
1343 Delaware Street
Denver, Colorado 80204
(303) 893-8933

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of August, 1993, a true and correct copy of the **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO WITHDRAW GUILTY PLEA** was hand delivered to:

Steven L. Jensen, Esq.
Deputy District Attorney
1726 Cole Blvd., 3300
Golden, Colorado 80401

/s/ Illegible